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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86669897
Applicant	Detroit Rivertown Brewing Company, LLC
Applied for Mark	ATWATER SPIRITS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Matter:	<i>In re Detroit Rivertown Brewing Company, LLC</i>
Applicant:	Detroit Rivertown Brewing Company, LLC
Mark:	ATWATER SPIRITS
Serial No.:	86/669,897
Docket No.:	TM0380
Filed:	June 22, 2015
Class:	33
Examining Attorney	Zachary Bello Law Office 111

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT’S APPEAL BRIEF

Pursuant to the Notice of Appeal filed on September 19, 2016, appealing the Examining Attorney’s refusal to register the mark ATWATER SPIRITS for distilled spirits (the “Applied-for Mark”), Detroit Rivertown Brewing Company, LLC (“Applicant”) hereby submits its brief on appeal. For the reasons and arguments made and incorporated herein, as well as the arguments and evidence previously presented in response to the Examining Attorney’s office actions, Applicant respectfully requests that the Trademark Trial and Appeal Board (“Board”) reverse the Examining Attorney’s refusal to register the Applied-for Mark, and direct the Examining Attorney to approve the same for publication.

DESCRIPTION OF THE RECORD

On June 22, 2015, Applicant filed United States Trademark Application Serial Number 86/669,897 for the Applied-for Mark.

On August 12, 2015, the Examining Attorney issued an office action (the “First Office Action”) refusing registration of the Applied-for Mark, on the grounds that (1) it is primarily merely a surname under Section 2(e)(4) of the Trademark Act; and (2) the word “SPIRITS” is merely descriptive of an ingredient, quality, characteristic, function, feature, purpose, or use of Applicant’s goods and/or services, and is thus an unregistrable component of the Applied-for Mark. First Office Action, TSDR pp. 2-3.

On March 14, 2016, Applicant submitted its response to the First Office Action (“Response to First Office Action”), disclaiming the word “SPIRITS,” and arguing and providing evidence that the refusal under 2(e)(4) of the Trademark Act was improper because the Applied-for Mark is not primarily merely a surname. Response to First Office Action, pp. 2, 6.

On March 18, 2014, the Examining Attorney issued a final office action (the “Final Office Action”), making final the refusal to register the Applied-for Mark under Section 2(e)(4) of the Trademark Act. Final Office Action, TSDR p. 2.

On September 19, 2016, Applicant timely filed a notice of appeal and paid the prescribed fee. Applicant now timely files its brief on appeal, in support of Applicant’s position that the Examining Attorney erred in refusing to register the Applied-for Mark.

STATEMENT OF THE ISSUE

Whether the Examining Attorney erred in refusing to register the Applied-for Mark on the ground that it is primarily merely a surname under Section 2(e)(4) of the Trademark Act.

LEGAL STANDARD

Whether a mark is primarily merely a surname depends on the primary, as opposed to secondary, significance of the mark to the purchasing public. *In re Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009); *see Sears, Roebuck & Co. v. Watson*, 204 F.2d 32, 32-34, 96 USPQ 360, 362 (D.C. Cir. 1953); *see also* TMEP § 1211.01. The Board has identified five factors to consider when determining whether a mark is primarily merely a surname: (1) whether the surname is rare; (2) whether the term is the surname of anyone connected with the Applicant; (3) whether the term has any recognized meaning other than as a surname; (4) whether it has the “structure and pronunciation” of a surname; and (5) whether the stylization of lettering is distinctive enough to create a separate commercial impression. *In re Benthin Mgmt. GmbH*, 37 USPQ2d 1332, 1333-1334 (TTAB 1995). Where the mark is in standard characters it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007). The Examining Attorney has the initial burden of proof, to make a prima facie showing that the mark would primarily be viewed as a surname. *In re Petrin Corp.*, 231 USPQ 902, 902-03 (TTAB 1986); *see* TMEP § 1211.02(a); *see also In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1571 (TTAB 2005). After making such a showing, the burden then shifts to the Applicant to rebut the showing. *Id.* Finally, if there is any doubt as to whether the Applied-for Mark is primarily merely a surname, the Board will resolve the doubt in favor of the Applicant. *Yeley*, 85 USPQ2d at 1151; *Benthin*, 37 USPQ2d at 1334.

ARGUMENT

The Applied-for Mark is not primarily merely a surname, because the primary significance of the Applied-for Mark to the purchasing public is not as a surname. Applicant

submits that this is apparent upon consideration of the fact that “Atwater” is a rare surname, is not the surname of anyone connected with Applicant, has recognized and more relevant meanings other than as a surname, and does not have the structure and/or pronunciation of a surname. Applicant submits that even if there were any doubt as to whether the Applied-for Mark is primarily merely a surname, the Board should resolve such doubt in favor of Applicant. *Yeley*, 85 USPQ2d at 1151; *Benthin*, 37 USPQ2d at 1334.

Applicant incorporates herein, by reference, the arguments made and evidence submitted in its Response to First Office Action. In light of such arguments and evidence, as well as the arguments and evidence adduced herein, Applicant respectfully requests that the Board reverse the Examining Attorney’s refusal, and instruct the Examining Attorney to approve the Applied-for Mark for publication.

A. The Examining Attorney Failed to Meet the Burden of Establishing That the Applied-for Mark Is Primarily Merely a Surname

Applicant submits that the Examining Attorney’s arguments and evidence in both the First Office Action and the Final Office Action fail to establish that Atwater is primarily merely a surname. Accordingly, Applicant submits that the Examining Attorney failed to meet the initial burden of proof, and respectfully requests that the Board reverse the refusal to register the Applied-for Mark.

1. *The Examining Attorney Failed to Make a Prima Facie Showing that ATWATER Would Primarily Be Viewed by the United States Purchasing Public as A Surname*

Applicant notes that in the First Office Action, the Examining Attorney did not explicitly address any of the four relevant¹ factors that the Board identified should be considered when

¹ Applicant notes that the Applied-for Mark appears in standard characters, so it is unnecessary to consider the fifth factor. *In re Yeley*, 85 USPQ2d 1150, 1151 (TTAB 2007).

determining whether a mark is primarily merely a surname. First Office Action, TSDR pp. 2-4. Rather, the Examining Attorney merely directed Applicant to evidence from <http://www.whitepages.com/name/Atwater> (the “EA’s Whitepages Evidence”), and concluded from that evidence *alone* that “Atwater” is primarily merely a surname. First Office Action, TSDR p. 2. Applicant notes that the EA’s Whitepages Evidence is a screenshot from the “Atwater” entry on Whitepages.com, showing that there are “5,009 Whitepages profiles found for ‘Atwater,’ and 734 possible matches.” First Office Action, TSDR p. 5. The Examining Attorney stated that the EA’s Whitepages Evidence “shows the applied-for mark appearing several times as a surname in a nationwide directory of names” and “establish[es] the surname significance of the surname ATWATER.” *Id.*

Applicant submits that the probative value of the EA’s Whitepages Evidence is low, and that it *alone* is not sufficient to support the Examining Attorney’s conclusion that “Atwater” is primarily merely a surname. Specifically, Applicant notes that it is unclear what the various figures in the EA’s Whitepages Evidence truly represent. First, it is unclear what it means to be listed in a profile on Whitepages.com, or what it means to be listed as a “possible match.” Second, it is unclear whether there are multiple or duplicate profiles for the same individuals, or even fabricated profiles. Third, it is unclear whether the individuals listed are alive or deceased. Fourth, it is unclear whether the individuals listed are Americans or foreigners. To this fourth point, Applicant provided, in Applicant’s Response to First Office Action, evidence showing that at least 38 of the “Atwater” profiles on Whitepages.com referred to individuals located in Canada. Response to First Office Action, Exhibit B. Applicant submits that use of a term as a surname in Canada or other foreign countries is not probative of whether the purchasing public

in the United States would perceive a term as primarily merely a surname. Because of the ambiguity of the EA's Whitepages Evidence, Applicant submits that it has a low probative value.

Applicant submits that it was wholly improper for the Examining Attorney to conclude, from the EA's Whitepages Evidence alone, that "Atwater" is primarily merely a surname. Applicant notes that the Examining Attorney has an initial burden of demonstrating that the term would primarily be viewed as a surname by the purchasing public in the United States. *See In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1571 (TTAB 2005). Further, Applicant notes, as the Examining Attorney acknowledged in the First Office Action, that it is "[t]he primary significance of the mark to the purchasing public [that] determines whether a term is primarily merely a surname." First Office Action, TSDR p. 2 (citing *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 832, 184 USPQ 421, 422 (C.C.P.A. 1975; *In re Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009); TMEP §§ 1211, 1211.01) (emphasis added). Finally, Applicant notes that the Examining Attorney neglected to even consider the factors that the Board identified should be considered in the determination of whether a term is primarily merely a surname.

Applicant submits that the Examining Attorney's arguments and evidence in the First Office Action were not sufficient to meet the Examining Attorney's initial burden of demonstrating that "Atwater" would primarily be viewed as a surname by the purchasing public in the United States. Alternatively, Applicant submits that *even if* the EA's Whitepages Evidence *did* establish that Atwater has surname significance, the Examining Attorney still failed to demonstrate (or even allege) that the *primary* significance of Atwater was as a surname. *See* First Office Action, TSDR pp. 2-4. Accordingly, Applicant submits that the Examining Attorney did not meet the initial burden of proof.

2. *The Evidence from Ancestry.com Is Not Sufficient to Conclude that Atwater Is Primarily Merely a Surname.*

Applicant notes that in the Final Office Action, relating to evidence that Applicant submitted from the website Ancestry.com, the Examining Attorney stated, “[A]pplicant provided evidence of Atwater Family History indicating 324,728 historical data” and “this voluminous evidence form [sic] the applicant is sufficient to conclude that Atwater is primarily merely a surname.” Final Office Action, TSDR p. 2. The Examining Attorney then concluded, “the applicant’s arguments are therefore, unpersuasive and the refusal to register under section 2(e)(4) is maintained and made FINAL.” *Id.* Applicant submits that the Examining Attorney’s analysis of this evidence is improper, and that the existence of historical data purportedly relating to “Atwater Family History” cannot be interpreted as substantiating the conclusion that the term “Atwater” is a surname, without actually analyzing the contents of the historical data.

Applicant acknowledges that Applicant provided, as Exhibit E to its Response to First Office Action, a screenshot from the Ancestry.com entry for “Atwater,” with the words “Atwater Family History” appearing prominently at the top (the “Ancestry.com Evidence”). Response to First Office Action, Exhibit E thereto. Applicant notes that Ancestry.com Evidence contains the following language: “324,746 Historical Documents with Atwater on Ancestry,” and “37,169 Birth, Marriage, and Deaths,” “4,907 Military Records,” “3,107 Immigration Records,” “28,168 Census and Voter Lists,” and “251,395 Member Trees.” *Id.*

Applicant submits that it was improper for the Examining Attorney to conclude that a listing of historical documents on Ancestry.com is “sufficient to conclude that Atwater is primarily merely a surname.” Final Office Action, TSDR p. 2 (emphasis added). First, it’s unclear that all of these documents pertain to individuals with the last name Atwater. For example, documents may refer to individuals who live in a city or county called Atwater, such as

Atwater, California. (*See, e.g.*, Examining Attorney’s evidence of the Wikipedia entry for “Atwater, California” at Final Office Action, TSDR p. 5). Second, it’s unclear what time period these historical documents cover, or whether they include Americans only, or foreigners as well. Third, it’s unclear if these documents are duplicative or redundant, which, Applicant submits, is highly likely to be the case. For example, an individual without the last name “Atwater,” whose mother was named Atwater, who immigrated to the United States, served in the military, registered to vote, moved to Atwater, California, was counted in the census, got married, and died (all documents which are likely to include some reference to that individual’s maternal surname), would likely have multiple “historical documents” under “Atwater” on Ancestry.com. Similarly, an individual without the surname Atwater that is born in a town called “Atwater” will likely be related to numerous documents that came up in the search results. In short, Applicant submits that the mere fact that Ancestry.com purports to have “324,746 Historical Documents with Atwater” has no probative value to the analysis of whether the term Atwater is primarily merely a surname, without doing a much lengthier and significant review of the actual contents of those documents.

Accordingly, like the EA’s Whitepages Evidence, The Ancestry.com Evidence is simply insufficient to show that “Atwater” is primarily merely a surname. Alternatively, Applicant submits that *even if* such evidence *did* establish that Atwater has *some* surname significance, it is certainly not sufficient to show that the *primary* significance of Atwater is merely as a surname.

3. *The Examining Attorney’s Remaining Arguments Are Conclusory, Unsupported by Evidence, and Unpersuasive.*

Applicant notes that, after concluding that the Ancestry.com Evidence was *sufficient* to support the refusal under 2(e)(4), the Examining Attorney very briefly addressed several of the

factors identified by the Board to be considered in the 2(e)(4) analysis. Applicant submits that the Examining Attorney's largely unsupported conclusions as to these factors are merely conclusory and not supported by evidence or case law, and are therefore unpersuasive and do not substantiate the refusal under Trademark Act § 2(e)(4).

Regarding the first factor, whether "Atwater" is a rare surname, the Examining Attorney states, "ATWATER is a popular and a common household surname in the United States. A prominent person with the name was Lee Atwater, the political strategist for former President's Raegan [sic] and George Bush." Final Office Action, TSDR p. 2. Applicant notes that Lee Atwater is deceased, having passed away on March 29, 1991. *See* Final Office Action, TSDR p. 6. Applicant submits that a deceased political strategist for former Presidents that served over 25 years ago is not a "prominent person" to the American purchasing public. Secondly, Applicant submits that evidence of *one* individual with the last name "Atwater" is hardly sufficient to support the Examining Attorney's conclusion that Atwater is a "popular and common household surname in the United States." Applicant submits that, at best, an extremely low (and increasingly *lower*) percentage of purchasing public in the United States know who Lee Atwater was. For these reasons, Applicant submits that this evidence does not support the Examining Attorney's conclusion that Atwater is a common or household surname.

The Examining Attorney also states, "[t]he applicant provided evidence indicating that there are 4994 people with the surname Atwater in the USA. The examining attorney asserts that the provided evidence is sufficient to make the surname not rare." Applicant acknowledges, as discussed in greater detail in Section B, below, that Applicant did submit evidence from Whitepages.com for the "Atwater" entry, and that such evidence showed "4,994 exact... matches for Atwater" ("Applicant's Whitepages Evidence"). Response to First Office Action, Exhibit B.

However, and as argued in greater detail in Section B below, it is unclear that “4,994 exact...matches for Atwater” on Whitepages.com corresponds to, as the Examining Attorney says, “4,994 people with the surname Atwater in the USA.” The Examining Attorney provided no evidence as to the meaning of a Whitepages.com match, let alone the accuracy or reliability of such evidence. Similarly, Applicant found that at least 38 matches in Applicant’s Whitepages Evidence for “Atwater” were for individuals living in Canada. Response to First Office Action, p. 3 and Exhibit B thereto. Alternatively, Applicant submits that even if this figure *did* correspond to the number of individuals in the United States with the last name “Atwater,” the Examining Attorney provided no *baseline* figure to which the 4,994 individuals should be compared. Applicant submits that without the context of a baseline (e.g., the United States population, or figures from case law precedent), the mere number of individuals with a given surname alone has hardly any probative value as to whether it is rare, particularly in a case like this, where it is such a low figure. Accordingly, Applicant submits that the Examining Attorney’s conclusion that Atwater is not a rare surname based on the Applicant’s Whitepages Evidence is conclusory and unpersuasive.

Regarding the third factor,² whether “Atwater” has alternate meanings, the Examining Attorney stated that Applicant’s argument that Atwater has a well-recognized, non-surname meaning (namely, “*at the water*”) is “misdirected because the alternative meaning does not dilute the potency of ATWATER as a surname.” The Examining Attorney continues, “The fact that the surname is also the phonetic equivalent of an ordinary word does not change the surname significance of the term,” citing *In re Pickett Hotel Co.*, 229 USPQ 760 (TTAB 1986). Applicant

² Applicant notes that the Examining Attorney did not address the second factor, whether “Atwater” is the surname of anyone associated with Applicant. Applicant notes, as elaborated on in greater detail below, that “Atwater” is *not* the surname of anyone connected with Applicant.

submits that the Examining Attorney has mischaracterized Applicant's argument. Applicant clarifies that Applicant is not arguing that "Atwater" *has no surname significance*, but rather, that the *primary significance* of "Atwater" is not merely as a surname. Applicant submits that the existence of alternate meanings generally, and in this case, the existence of the specific alternate meanings offered by Applicant, *does* dilute the potency of Atwater as a surname, insofar as it demonstrates that the public is aware of alternative meanings of the word. Also, the Examining Attorney's refusal to even consider the alternative meanings proffered by Applicant is even further evidence that the Examining Attorney has failed in his burden to establish a *prima facie* case that the term Atwater is *primarily merely* a surname. The Examining Attorney also says, "relevant consumers will believe and perceive ATWATER as nothing but a surname." Applicant submits, as elaborated in greater detail below, that this sweeping statement is simply wrong in light of the evidence provided by Applicant.

Finally, regarding the fourth factor, the structure and pronunciation of the Applied for mark, the Examining Attorney merely makes the following unsupported and conclusory statements: "Here, the name has the structure and pronunciation of a popular surname" (Final Office Action, TSDR p. 3) and "Here, consumers will readily believe that Atwater is a surname in the instant case. This is because ATWATER looks and sound [sic] like a surname" (*Id.*). Applicant submits that these two conclusory statements about the structure, pronunciation, and look of "Atwater" are wholly unsupported and are entirely insufficient to support that "Atwater" is primarily merely a surname.

In sum, Applicant submits the Examining Attorney failed to meet the initial burden of demonstrating that the Applied-for Mark is primarily merely a surname. Accordingly, Applicant

respectfully requests that the Board reverse the Examining Attorney's refusal to register the Applied-for Mark, and direct the Examining Attorney to approve the same for publication.

B. A Proper Analysis of the Relevant *Benthin* Factors Reveals that the Applied-for Mark is Not Primarily Merely a Surname

1. *Atwater is a Rare Surname.*

The first factor to consider when determining whether a mark is primarily merely a surname is whether the surname is rare. *Benthin*, 37 USPQ2d at 1333-34. Applicant submits (although the Examining Attorney did not explicitly so state) the EA's Whitepages Evidence from the First Office Action was *intended* to demonstrate that the Applied-for Mark is *not* a rare surname. *Accord* Final Office Action, TSDR p. 3 (where the Examining Attorney states, regarding Applicant's Whitepages Evidence, that "[T]he name is not rare. The applicant provided evidence indicating that there are 4994 people with the surname Atwater in the USA. The examining attorney asserts that the provided evidence is sufficient to make the surname not rare.").

As argued above, Applicant submits that the Whitepages.com evidence is ambiguous and has a low probative value, and should not be *solely* relied upon when determining whether "Atwater" is a rare surname. Accordingly, Applicant submits that it is not sufficient to show that "Atwater" is a rare surname. Alternatively, Applicant submits that *even if* the First Whitepages Evidence *did* accurately represent that there were 5,009 individuals in the United States with the surname Atwater on September 11, 2015, such a figure actually demonstrates that Atwater is a rare surname. Applicant notes United States Census Bureau estimated that the population of the United States on September 11, 2015, was 321,980,642 individuals. Response to First Office

Action, Exhibit A. Applicant notes that, *even if* 5,009 individuals in the United States had the surname Atwater on that date, they constituted only 0.00156% of the United States Population, or only about 1 individual in every 64,280 individuals. Applicant notes that when Applicant accessed the same hyperlink on March 14, 2016, Whitepages.com listed only 4,994 profiles for the surname “Atwater.” *Id.* at Exhibit B. Applicant notes that the population on March 13, 2016³ was 323,157,270 individuals. Response to First Office Action, p. 3-4 and Exhibit C thereto. Applicant submits that *even if* 4,994 individuals had the surname Atwater on that date, they constituted only 0.00155% of the United States Population, or only about 1 in every 64,709 individuals. Applicant submits that even if these numbers were accurate, this miniscule fraction of the United States population with the surname “Atwater” actually supports that it is a rare surname.

Because Atwater is a rare surname, Applicant submits that this factor weights *against* finding that the Applied-for Mark is primarily merely a surname. Alternatively, even if Atwater is not considered an “extremely rare” surname, Applicant submits that the term is rare enough as to be a neutral factor, and should not weigh heavily towards finding that the Applied-for Mark is primarily merely a surname.

2. Atwater is Not the Surname of Anyone Connected with Applicant

The second factor in the analysis of whether a mark is primarily merely a surname is whether the term is the surname of anyone connected with the Applicant. *Benthin*, 37 USPQ2d at 1333-34. As noted above, the Examining Attorney appears not to have considered this factor at

³ Applicant notes that the population of the United States on March 14, 2016—the date Applicant performed its own Whitepages.com search for “Atwater”—was unavailable when Applicant submitted its Response to First Office Action. Accordingly, Applicant used the population of the preceding day, and made such population of record in its Response to First Office Action.

all in the First or Final Office Actions. Applicant notes that “Atwater” is not the surname of anyone connected with Applicant. Rather, and as elaborated upon in Section 3, below, the only connections between Applicant and the word “Atwater” is the fact that Applicant is located *at the water* (Specifically, the Detroit River), and in proximity to a street named “Atwater” (which street is also located *at the water*).

Because “Atwater” is not the surname of anyone connected with Applicant, Applicant submits that this factor weighs against finding that the Applied-for Mark is primarily merely a surname.

3. *Atwater Has Several Recognized Meanings of Greater Significance than as a Surname.*

The third factor in the analysis of whether a mark is primarily merely a surname is whether the term has any recognized meaning other than as a surname. *Benthin*, 37 USPQ2d at 1333-34. Applicant notes that the word “Atwater” is a combination of the preposition “at” and the noun “water,” which combine to form the phrase “at [the] water.” *Accord* Response to First Office, Exhibit E (the Ancestry.com Evidence) (stating, “Atwater Name Meaning...Middle English atte water ‘at the water.’”). The Ancestry.com Evidence continues: Atwater is “[a] topographic name for someone whose dwelling was by a river or lake.” *Id.* Applicant notes that Applicant is located at 237 Joseph Campau, Detroit, Michigan 48207, only a block away from the Detroit River. *See* Response to First Office Action, Exhibit D. Applicant submits that Applicant’s proximity to the Detroit River increases the significance of the meaning of the term “Atwater” as suggestive of something being located near the water.

Applicant notes further that Applicant is located near Atwater Street, which is the *last street on Applicant's block before reaching the Detroit River. Id.* Applicant submits that the fact that Atwater Street is located *directly in front of the Detroit River* is even further evidence of the significance of the term “Atwater” as suggesting that something is located “at the water.”

In addition to suggesting that something is “at the water,” the Examining Attorney’s own evidence clearly shows that the term “Atwater” is the name of a town in California. *See* Final Office Action, TSDR p. 26. Applicant notes that a term with surname significance may not be primarily merely a surname if that term also has a well-known geographical meaning. *In re Colt Indus. Operating Corp.*, 195 USPQ 75 (TTAB 1977) (holding FAIRBANKS not primarily merely a surname because the geographical significance of the mark was determined to be just as dominant as its surname significance). Applicant submits that “Atwater” has a well-known geographical meaning, as the name of a city in California (and likely several other cities across the United States), and that the geographical significance of the term “Atwater” is just as significant as any surname meaning of the term.

In light of the arguments and evidence above, including the Examining Attorney’s own evidence of the significance of “Atwater” as the name of a town in California, Applicant disagrees with the Examining Attorney’s conclusion that “relevant consumers will believe and perceive ATWATER as nothing but a surname.” Final Office Action, TSDR p. 3. Rather, Because the primary significance of the term “Atwater” is as a way to suggest that something is “at the water,” the Applied-for Mark is not primarily merely a surname. Similarly, because “Atwater” has well-known geographical significance that is equal to or greater than its surname significance, the Applied-for Mark is not primarily merely a surname. Accordingly, the Applied-for Mark is not primarily merely a surname. Because “Atwater” has several well-recognized,

non-surname meanings, Applicant submits that this factor weighs against finding that the Applied-for Mark is primarily merely a surname.

4. *Atwater does not have the “Structure and Pronunciation” of a Surname*

The fourth factor to consider when determining whether a mark is primarily merely a surname is whether the mark has the structure and pronunciation of a surname. *Benthin*, 37 USPQ2d at 1333-34. As noted above, the Examining Attorney supplied no evidence that “Atwater” has the structure and pronunciation of a surname. Rather, the Examining Attorney merely made the following two unsupported conclusory statements: “Here, the name has the structure and pronunciation of a popular surname” (Final Office Action, TSDR p. 3) and “Here, consumers will readily believe that Atwater is a surname in the instant case. This is because ATWATER looks and sound [sic] like a surname” (*Id.*). Applicant reiterates that these two conclusory statements about the structure, look, and pronunciation of “Atwater” are wholly unsupported, conclusory and entirely insufficient to support the Examining Attorney’s conclusion that Atwater is primarily merely a surname.

Additionally, Applicant submits that “Atwater” does not have the structure and pronunciation of a surname. In Applicant’s Response to First Office Action, Applicant provided a list of the 450 most common surnames according to the 2000 U.S. Census data. Response to First Office Action, Exhibit F. Applicant notes that *none* of these surnames begin with the letters “AT,” contain the combination “TW,” or conclude with the letters “ATER.” Accordingly, Applicant submits that the unique combination of letters composing the term “Atwater” does not share any structure or pronunciation characteristics of the most common surnames. For at least these reasons, Applicant submits that “Atwater” does not have the structure and pronunciation of

a surname. Accordingly, Applicant submits that this factor weighs against finding that the Applied-for Mark is primarily merely a surname.

CONCLUSION

Based on the foregoing arguments and evidence, as well as the arguments and evidence provided in Applicant's Response to First Office Action, Applicant submits that the Applied-for Mark is not primarily merely a surname. Applicant submits that the Examining Attorney's sweeping and unsubstantiated allegations and conclusions fall well short of meeting the initial burden of showing that the Applied-for Mark is primarily merely a surname. Further, Applicant submits that a proper analysis of the factors identified by the Board in *Benthin* reveals that the Applied-for Mark is not primarily merely a surname. Finally, Applicant submits that if there is *any doubt* as to whether the Applied-for Mark is primarily merely a surname or not, such doubt should be resolved in favor of Applicant, and a finding that it is not primarily merely a surname. *In re Joint-Stock Co. "Baik,"* 84 USPQ2d at 1922; *In re Benthin Management*, 37 USPQ2d at 1334. Because the primary significance of the Applied-for Mark to the purchasing public is not as a surname, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal to register the Applied-for Mark under Trademark Act § 2(e)(4), and direct the Examining Attorney to approve the same for publication.

Dated November 17, 2016.

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